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[1] UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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[3] PIONEER TRADING (ASIA PACIFIC)

3 LTD.,

[4]

4 Plaintiff,

[5]

5 v. 04 CIV 5655 (DAB)

[6]

6 SEYANG SHIPPING COMPANY,

[7] LTD.,

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[8]

Defendant.

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[9]

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[10]

August 19, 2004

10

11:15 a.m.

[11]

11 Before:

[12]

12 HON. DEBORAH A. BATTS,

[13]

13 District Judge

[14]

14 APPEARANCES

[15]

15 HEALY & BAILLIE, LLP

[16]

Attorneys for Plaintiff

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BY: LEROY LAMBERT

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BY: ARMAND M. PARE

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[1] THE COURT: Good morning. Please be seated.

[2] Pioneer Trading Ltd. versus Seyang Shipping Company
[3] Ltd.

[4] On behalf of the plaintiff we have Mr. Lambert?

[5] MR. LAMBERT: Yes, your Honor. Good morning.

[6] THE COURT: And on behalf of the defendant we have
[7] Mr. Pare?

[8] MR. PARE: Yes, your Honor.

[9] THE COURT: Good morning.

[10] Now, the issue initially seems to be whether or not at
[11] the time that the plaintiff filed its papers seeking the
[12] garnishment, that indeed the defendant was, quote, not to be
[13] found in the district.

[14] I have reviewed the plaintiff's papers and the
[15] defendant's papers, and I have seen what the plaintiff did in
[16] ascertaining whether or not the defendant was here, and I have
[17] seen the response of the defendant.

[18] Now, Mr. Lambert, was there any reason that the
[19] Secretary of State was not served?

[20] MR. LAMBERT: Your Honor, we have 120 days to serve
[21] the complaint, and what we were after is quasi in the realm of
[22] jurisdiction, trying to get the property in this District,
[23] and —

[24] THE COURT: All right. So, I guess my question is:
[25] What was the basis for that if, indeed, he was, the defendant

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[1] was found in the district?

[2] MR. LAMBERT: The person registered as the corporation
[3] under New York law with the Secretary of State was a New York
[4] corporation of the same name. Our defendant is a Korean
[5] corporation.

[6] There is no dispute that the defendant is the Korean
[7] corporation and it's an interesting point, but there is simply
[8] no allegation that, say, I will call them Seyang New York is
[9] doing the business of Seyang Korea in this District or New York
[10] at all.

[11] So, I, frankly — I mean, since I'm the one who did
[12] the affidavit of search, I was tempted just to stop there, as
[13] we say, in the brief. They could have incorporated Smith
[14] Brother's Shipping. It's a separate entity and I am not
[15] alleging veil piercing.

[16] THE COURT: You are not alleging veil piercing?

[17] MR. LAMBERT: No, I am not, as Seyang New York and
[18] Seyang Korea.

[19] THE COURT: Let me hear from Mr. Pare.

[20] MR. PARE: We do not think that that is the critical
[21] issue in this case, and the reason for that is that it is not
[22] clear that any funds have been attached by the first round of
[23] attachments. We think that the critical issue in this case is
[24] whether future attachments should be permitted or whether,
[25] instead, the case should be stayed pending arbitration, as

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[1] but in the meantime there was a general appearance; that is all
[2] he said.
[3] What he actually did was to vacate the previous
[4] attachment. I don't believe it's as clear as Mr. Pare makes it
[5] out to be. We address these issues in our briefs, refer to the
[6] Oilmar case, and also the MidAfrica case, Judge Lowe's case.
[7] Again, that was a secondary holding as it were. She already
[8] reached her main holding on why the attachment should be
[9] vacated.
[10] But if you look at the purposes of Rule B, in light of
[11] the present day prevalence of maritime disputes being reduced,
[12] maritime disputes being resolved by arbitration, then I think
[13] the issue needs to be addressed and clarified because you have
[14] your general appearance in the arbitration, that's where the
[15] merits are being decided.
[16] **THE COURT:** But I also have a general appearance in a
[17] case before me, and it was in this court that the writ of
[18] attachment was issued, and that — that is my concern here.
[19] Let me — bear with me just one second. Where is the
[20] order that was signed by Judge Hellerstein?
[21] All right. I am looking at the the order Judge
[22] Hellerstein signed. Is it, I take it, Mr. Pare, the bottom of
[23] page three, the order that says ordered, that supplemental
[24] process enforcing the court's order may be issued by the clerk
[25] upon application without further order of the Court. Is that

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[1] what you are challenging?
[2] **MR. PARE:** Yes, your Honor.
[3] **THE COURT:** And that's it, what you are challenging?
[4] **MR. PARE:** Well, the whole concept. Not just the
[5] phraseology of the order, but the whole concept, my opponent
[6] saying I now have the right to go ahead and do that.
[7] **THE COURT:** All right.
[8] **MR. LAMBERT:** Your Honor, may I just point out
[9] that that language tracks Rule 1(b).
[10] **MR. PARE:** But it doesn't come in a vacuum; it comes
[11] with all the maritime law associated with it.
[12] **MR. LAMBERT:** The clerk may issue supplemental process
[13] enforcing the court's order on application without further
[14] court order.
[15] **THE COURT:** Yes. Well you know what, I think isn't
[16] that under certain circumstances like of an emergency nature?
[17] **MR. LAMBERT:** No, your Honor. Because once I have
[18] made my showing that he could be found, I can try to find
[19] property wherever I can without bothering the court again.
[20] Just let me volunteer something, your Honor. If, if
[21] your Honor wishes to take the decision under advisement, I will
[22] certainly undertake not to seek such writs without coming to
[23] you first.
[24] **THE COURT:** Well, let me do better than that. It
[25] seems to me that Mr. Pare has a weighty argument in terms of

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[1] the impact of a general appearance on these orders of
[2] attachment, and it would be difficult for me to say that it
[3] makes sense to continue beyond the appearance the force and
[4] effect of the order of attachment based on the case law and the
[5] understanding of the function of it.
[6] Yes, it does have a dual purpose under Rule B of
[7] security as well as appearance, but I cannot see in the
[8] materials submitted and the cases discussed a statement that
[9] the security interest continues once the appearance has been
[10] made and, therefore, a continuing order of attachment is
[11] appropriate.
[12] So, under those circumstances, I am ruling in favor of
[13] the defendant, and my ruling would be to nunc pro tunc that
[14] part of the order signed on July 21st, to eliminate that phrase
[15] that talks about supplemental process enforcing the Court's
[16] order may be issued without further order of the Court. That
[17] part is stricken and, therefore, the order of attachment is
[18] valid up to the point of the time of a general appearance,
[19] since the general appearance was made.
[20] When did you file your appearance, Mr. Pare?
[21] **MR. PARE:** I think it was August 6th, if I am not
[22] mistaken, your Honor.
[23] **THE COURT:** So anything between July 21st and August
[24] 6th is fair game, and that has turned up nothing as I
[25] understand it. And I am terminating the impact of that order

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[1] of July 21st as of this point because of the appearance, the
[2] general appearance of the defendant in this case.
[3] I am staying this proceeding, I imagine pending
[4] results of the arbitration going on in London.
[5] Are there any other matters that we need to deal with
[6] in this case at this time?
[7] **MR. LAMBERT:** Your Honor, could I just ask for a
[8] clarification on the stay? Because again, as I said, I think
[9] there are eight or nine garnishees that I have not formally
[10] heard from.
[11] I think, I will let Mr. Pare address it, if I could
[12] just keep the action alive for the purpose of vetting the — in
[13] other words, we served them with a garnishment, as well as
[14] interrogatories, and we asked them questions. Do you have
[15] money? Have you had money? And I don't have proper answers.
[16] And this just happened the end of July. I have 20 days to do
[17] that.
[18] Is it clear that I still have the right to finish that
[19] up, all relating — I'm not going to serve any more
[20] attachments.
[21] **THE COURT:** You have the right to finish it up in
[22] terms of monies in the account prior to August 6th.
[23] **MR. PARE:** Yes, your Honor, I believe so.
[24] **THE COURT:** August 6th. So anything that they had in
[25] that account between July 21st and August 6th would be subject

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[1] to the order of attachment signed on the 21st.

[2] Mr. Pare?

[3] **MR. PARE:** Yes. The only point at which I would, this
[4] is the point I would make. Under Rebore it only attaches money
[5] that is actually in any account or in any bank at the moment of
[6] the levy. If the money comes in, the next day under Rebore, it
[7] doesn't attach it.

[8] Now, if my opponent had made a second attachment on
[9] August 2nd or August 3rd or August the 4th and gotten money,
[10] then, yes, that would be attached. But the fact that he made
[11] an attachment on July the 21st —

[12] **THE COURT:** Did you make the attachment on July 21st?

[13] **MR. LAMBERT:** I made an attachment, I would say, on
[14] maybe 12 or 13 of the banks. I only did it once. Whether it
[15] was July 21 or July 22 or July 23, I don't remember.

[16] On three or four of the banks, I did go up once in the
[17] morning, once in the afternoon and the next day.

[18] Reflecting what Mr. Pare just said, I'm trying to
[19] serve it at a time when the bank actually has one of these
[20] transfers coming through and that's what I would like to vet.
[21] It does seem to me that the record on that issue is closed. I
[22] either got something or I didn't. But I am entitled to an
[23] efficient response from the banks about whether I did or
[24] didn't, and did they do what they were supposed to do in
[25] response to my writ.

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[1] **THE COURT:** All right. So, then let me modify what I
[2] just said.

[3] That under Rebore it would seem that on the day that
[4] the attachment was, excuse me, served on the bank, that is
[5] what's at issue, not forward. So that if you served on July
[6] 23rd, any funds in the bank up to July 23rd would be subject to
[7] the attachment.

[8] **MR. PARE:** Not exactly. Under Rebore, the moment, not
[9] the day, if the money the attachment is leveled at 12 o'clock
[10] noon on August the 1st, and there is money there, at that time,
[11] Rebore says the attachment validly reaches the money. If the
[12] money comes in at one o'clock, it does not.

[13] **THE COURT:** And how are we keeping track of what time
[14] the attachment was actually entered?

[15] **MR. PARE:** That is the subject of Rebore and cases
[16] that have followed it and it gets to be pretty picayune. We
[17] don't have that case before you. A lot of times you bring in
[18] the bank officer, you bring in the statements and there is
[19] testimony.

[20] **MR. LAMBERT:** Our process server notes the time and
[21] you get into issues about, does the bank, how much time does
[22] the bank have to respond, and — but these are the types of
[23] issues I would like — I don't want the action stayed so as to
[24] preclude me, and I don't think Mr. Pare is objecting to vetting
[25] those issues about what the bank did or did not do, whether

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[1] there were, there were or were not funds at the time I served
[2] the process.

[3] **THE COURT:** All right. So then —

[4] **MR. LAMBERT:** I don't think we need to get so far into
[5] Rebore. I don't think you need to make a prospective ruling
[6] under Rebore until we find out whether there is any issue at
[7] all.

[8] **THE COURT:** Whether?

[9] **MR. LAMBERT:** Whether we ever got anything.

[10] **THE COURT:** Let me say in terms of the merits of the
[11] case, obviously that is what I am saying.

[12] Until further action in the arbitration, should you
[13] wish to bring this back to me then either confirming or
[14] whatever, then we will deal with that at that time.

[15] In terms of the actual writ, however, if there are
[16] issues about when the levy was made, and when there were funds,
[17] I would keep that open, and you can bring that in, and we will
[18] deal with that in terms of whatever proof you have, whatever
[19] disagreements you have on that. But I am not of the school
[20] that once an appearance has been made further levies are
[21] appropriate, and I am also — well, I guess that's as far as I
[22] need to go.

[23] Are there any other issues that we need to deal with
[24] in this case at this time? Mr. Lambert?

[25] **MR. LAMBERT:** Your Honor, speaking for my client, as

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[1] well as the bar in general, it would be of service to the bar
[2] if your ruling today could be made in a fashion that we could
[3] publish it to the bar, whether it has to be a formal opinion
[4] or —

[5] **THE COURT:** Well, I will tell you what I will do. I'm
[6] going to order this transcript on a daily basis and I am going
[7] to split the cost between the parties. And since I have made
[8] my ruling on the record and giving you my reasons therefore,
[9] and it is also including your wonderful arguments, I think that
[10] should make it pretty clear.

[11] All right?

[12] **MR. LAMBERT:** Thank you, your Honor.

[13] **MR. PARE:** Thank you, your Honor.

[14] **THE COURT:** All right. This matter is adjourned.
[15] Please see Bonnie.

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